IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

TANANA TRADING COMPANY, a corporation,
Plaintiff in Error,

vs.

NORTH AMERICAN TRADING & TRANSPORTATION COMPANY, a corporation,
Defendants in Error.

No. 2172

BRIEF OF DEFENDANT IN ERROR

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Records of U. S. District
Court of Appeals
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STATEMENT.

The Tanana Trading Company was organized in January, 1905. There are seven stockholders; Bain, Struthers, Bishoprick, Blair, Cameron, and Livingston. There were a thousand shares but only four hundred twenty-three shares issued. Bain and Struthers own two hundred thirty-seven and all the others one hundred eighty-five (see Tr. p. 124). Bain being elected president and Struthers treasurer, they continued to act until the fall of 1906 *The company had seven directors and every one of the seven stockholders was also a director.* The by-laws provided for a meeting of directors once a month, but no such meetings were held (125). The affairs, from January 1905 until November 1906, were managed and controlled by Bain and Struthers. Bishoprick was a salesman soliciting business on the creeks. Dwyer was a clerk in the company's store at Chena.

The Tanana Company, organized to do a merchandise business, both wholesale and retail, owned the "Ella," the barge "Independence, a 9-16 interest in the "Light," and it was also building a barge at St. Michaels to be named the "Dakota." These steamers were being used to transport freight for the company and others . The company had been so unsuccessful in the transportation business that the steamer "Light," during the one season that they had operated her, showed a loss of some

$15,000.00 (257). In fact, it had cost that company $77.01 per ton to transport freight from Seattle to Chena (258), a cost not including depreciation, insurance and winter quarters of the steamers. The company was heavily involved in debt, with a large overdraft at its bank and many lienable claims for the barge "Dakota" building at St. Michaels (724).

Such was the condition when Bain left Chena for Seattle in the spring of 1906. The company had previously discussed the sale of some of its boats in order to obtain funds to maintain its merchandise business (725). It had offered to sell its 9-16 interest in the "Light" in February 1906 for $9500.00 (197). The "Ella" had cost $6000.00, the "Independence" $5000.00, and the "Dakota" then building, deducting lienable claims then due and pressing, about $12,000.00 (129). This did not include any depreciation nor valuable equipment removed from the "Ella."

In reviewing the facts we divide them into

(a) Negotiations at Seattle, (Isom-Bain);

(b) Simultaneous consultations among directors at Chena;

(c) Acquiescence during that season, 1906;

(d) Ratification and estoppel by acts in 1907.

(a) Negotiations at Seattle.

Early in July 1906 Bain, through a mutual friend, met W. H. Isom, general manager of the North American Transportation & Trading Company, engaged in transportation on the Yukon.

Bain proposed a sale of two boats and barges. He stated to Isom that the Tanana Company was in financial straits; that if he could get a fair price his company would like to sell the boats (498-9). The North American Company, on the other hand, had plenty of vessels and was only interested in tonnage. Bain stated that his company could not even pay for the "Dakota" then building (499). After some negotiations, Isom made an offer of $57,000.00 for the two boats and barges. Bain in case of sale wanted a freight rate for his company's shipments thereafter of $50.00 per ton. This Isom refused, so they finally agreed on $60.00 (501), closing the $57,000.00 price also on July 6th, and Bain representing to Isom that he had full authority for these terms.

It was not until July 7th that Bain told Isom that he had received a wire that the Tanana members were not entirely satisfied (502). They desired not to turn over the boats until the expiration of the second trip and then to get a special freight rate for the rest of the season, Bain showing on the 8th this telegram of Struthers to him of that date:

"Willing to sell our interests stated [that is $57,000.00], boats to be turned over immediately upon expiration of second trip, we to get special freight rate balance season and next." (728).

Thus the purchase price was ratified but not the freight rate. Upon this Isom agreed to give $60,000.00 payable $10,000.00 in cash, $30,000.00 for merchandise purchases, and $20,000.00 in freight

hauls by Isom's company at a special rate of $60.00 per ton. These were the terms on which Bain and Isom agreed on the afternoon of the 9th of July, the formal contract to be drawn, as it was, on the next morning (503). *The prevailing freight rate* in 1906 was $70.00 per ton (463).

Up to this stage nobody, we think, can claim fraud in any degree. Bain, president and largest stockholder, was representing his company at a great distance from it and might reasonably be supposed by Isom to have latitude to adjust and concede in bargaining, and it might well be expected that the excesses or departures from instructions almost always occurring in officers' negotiations would be accepted.

On the afternoon of the 9th, the sale between Bain and Isom being thus completed with the exception of the formal papers, Isom wired his agent at St. Michael to take charge of the uncompleted barge (509). He also telegraphed his agent at Fairbanks to receive the other boats (Exhibits 29, 30). Bain for his part wired the agent of his company at St. Michael to deliver the barge (Exhibit 31) and his company at Chena as follows (Ex. 26):

"J. Fred Struthers, Vice Prest. Tanana Trading Co., Chena, Alaska.—Have made sale. Pass corporate resolutions and deliver boats and barges immediately to H. B. Parkin, agent for W. H. Isom. Wire when delivered.—A. E. Bain, Prest.—9:05 P. M."

Both these telegrams were sent on the 9th at 5:16 P. M.

On the morning of the 10th the formal contract was signed. Simultaneously Isom telegraphed his agent at Fairbanks to make the $10,000.00 payment on account of the purchase (519).

No word was received from Chena or Fairbanks until the morning of the 11th, when Isom received a telegram from his agent Parkin at Fairbanks (517). The telegram itself shows that it was received at Seattle at 9:15 P. M. on July 10, after office hours (517, Ex. 33). It mentioned a freight rate of $30.00, *and was the first word that Isom had, either directly or indirectly, that any of the Tanana people had suggested a freight rate of such* an amount. Nor was it until *the 11th* that Bain spoke to Isom concerning any word from his associates (520), when, not showing Isom any telegram, he said that he had a telegram that he could not understand. His people were asking for a $30.00 rate. Isom said: "If that is the case, you had better call the thing off. I won't consider such a ridiculous proposition, and Bain said, 'No, there is no doubt that there is a mistake in the code word.' The telegram was in code." (520).

The Tanana members we have seen had previously agreed to $57,000.00 and a "special freight rate" and Isom had given $60,000.00 and a special rate, and it was evening, July 11th, before Bain showed Isom a telegram from Struthers asking for payment in a different way (521).

On July 11th Isom, beginning to think from Parkin's telegram to him that there might be some misunderstanding about the $30.00 rate, went to his attorney's office:

"I then asked him, I said, 'The way I acted is there any possibility of my getting into a legal complication on this. If so, I want to get right out of it at once,' and he said, 'You can't very well get out of it now. You have agreed to go ahead. They will sue you if you try to get out of it.'"

There was some difficulty about the title to the boats. The "Independence" was not registered in the Tanana Company's name but in Bishoprick's (528). Isom then proceeded to Alaska on his regular trip of inspection, and on August 23 met Dwyer at Fairbanks, but Dwyer said nothing to him about the freight rate, nor did any of the other members of the Tanana Company discuss this question with him (530, 531). Whatever may have been the alleged dissatisfaction at Chena (Fairbanks), Isom knew nothing of it.

Bills of sale to the vessels were then prepared in Fairbanks, executed by Struthers as vice-president and Dwyer as secretary, formally transferring the boats (Exs. 35, 36). Morever, the $30,000.00 had been advanced by Isom for merchandise, in accordance with the contract (539-542), and all payments were made, under the $60,000.00, with the exception of $1397.80, this item withheld because the N. A. T. had never received a bill of sale to the "Independence." (543).

The total freight charge to the Tanana Company for that year was $41868.04 (545). We must remember that at the time the contract was executed (the 10th of July) Isom knew nothing about the $30.00 freight rate (572), and it was not until the 11th that he got the information of a desired $30.00 rate (578). Even then Bain said nothing about a resolution of the company (576) or that this was more than an ordinary dissent of some shareholder.

(b) Simultaneous Consultations at Chena among Directors.

Having recounted what transpired at Seattle in relation to the execution of the contract, let us turn to the action of the director-shareholders at Chena. Remember, no formal meeting of the board of trustees was ever had of this company from the time of its incorporation (125). Stockholder-director Livingston was not present in Chena in July. He was located at St. Michaels. On July 6 or 7, Struthers, Bishoprick and Dwyer received the Seattle telegram from Bain announcing the sale for $57,000.00. These men responded to that telegram on July 7, in which no mention was made of the freight rate. They asked that the Tanana Company be allowed to complete a certain Pennsylvania cargo. "The boys" were anxious to sell (723-724) and this was deemed advisable by Bishoprick, Dwyer, and Struthers.

They then received Bain's telegram of July 7: "Foolish not to accept the proposition. Wire

amount immediately that will be accepted." (728) to which Struthers replied on the 8th, after consultation with Bishoprick and Dwyer, that they were willing to sell their interests and that the boats would be turned over on the expiration of the second trip, the Tanana Company to get a special freight rate for that season and the next (728). No mention was made of any $30.00 rate and only that they were to get *a special one* (729). It was on this attitude communicated by these in Alaska that Bain telegraphed Struthers on the 8th that he thought he could get $60,000.00. This sum was discussed by the three at Chena (729). Cameron may have been present part of the time but did not participate in the discussion. Livingston was at St. Michaels and Blair absent. It was discussed only by the three (730).

They now received the telegram (Deft's. Ex. 32) already set out announcing the sale and requesting a corporate resolution, to deliver the boats and barges to Parkin, agent, and to wire when delivered. *This was considered satisfactory to these three.* Nothing had been said about a special freight rate. After six o'clock that night it was suggested by Bishoprick that they embody in the resolution that the freight that they were bringing forward on the Pennsylvania shipment should be landed free of charge, and Struthers said:

"Well, I said, 'They won't stand for anything like that. Why don't you make it good and put

it at $30. a ton?' and they made it $30. a ton. I said, 'All right, we will draw up the resolution.'

"Q. That was the first time $30.00 was mentioned?

"A. That was the first time absolutely that $30. was mentioned.

"Q. Do you know what time that was?

"A. *That was on the evening of the 9th.*

"Q. Here is a telegram dated Chena, Alaska, July 9.—'A. E. Bain, Lincoln Hotel, Seattle, Washington.—Will accept $60,000. our interest boats, purchasers to land our freight this season Chena flat rate $30. Absolutely impossible to get Frank John agree to any other terms. Wire immediately. Can arrange McGinn to-day. Boats here.—Struthers.' "

By "Frank" and "John" were meant Bishoprick and Dwyer (731). This telegram was received by them at Chena on the evening of the 9th (732), at which meeting there were present Bishoprick, Dwyer, Struthers *and Cameron* (732). This meeting was not held in accordance with the by-laws, it was simply informal (733). On the evening of the 10th the members at Chena had an intimation as to the terms of the agreement entered into between Bain and Isom (736). Struthers was first advised of this in the following manner:

"Q. How did you find that out?

"A. Well, I had gone home from the store after they had had this signed up and the telegrams were sent, and was getting ready for bed.

"Q. What time was that?

"A. That was probably 10 o'clock, maybe half past 10, and a man came down on a run and said they wanted me down at the store right away. I thought the place was on fire or something and I got dressed, put on the remainder of my clothes and went down there, and as soon as I opened the door Bishoprick landed on me with a telegram and said: 'What do you know about this?' and I said, 'Let me see it and I will tell you what I know about it,' and it was a telegram from Bain that said: 'Will you stand by me on the sale, or 'I want you to stand by me on the sale.'

"Q. That is in the matter of the boats?

"A. It was.

"Q. 'In matter boat sale won't you back my action and turn over boats immediately. Advice McLean interests.—A. E. Bain,' that is the telegram? (See also Eccles deposition 1029).

"A. Yes sir, that is the telegram. They had two other telegrams there at the same time.

"Q. What were the other two?

A. I don't remember what they contained?

"Q. Just state what the conversation was between you and Bishoprick and Dwyer.

"A. Bishoprick handed me that very much excited and wanted to know what I knew about it and I took and read it over and I said 'I do not know anything about it, what do you know about it?' and he said: 'I don't know anything about it,' and he said, 'What do you think is meant by it?' 'Well,' I said. 'if you want to know what I think is meant by it, I think possibly the sale has gone through on a little different terms.' I said, 'Wouln't it look that way to you?' and he said, 'Yes it would.' And he said, 'What are you going to do about it?' And I said, 'I am going to stand by Bain in the sale,' and he said: ' I was to tell you,

Struthers, I don't know whether you know, but I have been out there with Bain when he has been out to purchase goods and has been handling funds, and while I don't want to say or leave the impression that there is anything wrong with Bain, at the same time he always deposits all company funds in his own name. Now he is out there and we are sending him money, if he gets any big sum of money from the N. A. T. & T. Company it will all be deposited in his own name, and supposing he should die, we are right up against it. We might ultimately get that money back but it would possibly be hard work and we would have to prove that that is our money. Now I insist that all money paid to Bain by the N. A. T. & T. Co. is deposited with the Washington Trust Company in the name of the Tanana Trading Co.' I said, 'All right, Frank, I will telegraph him that in the morning.'

"Q. Did Bishoprick from this telegram know that the thing had not gone through corporate resolution?

"A. Bishoprick knew from this telegram that the thing had not gone through corporate resolution, and that was the only thing he said, when I told him that I would back Bain's action and stand by Bain, was his objection to any money being deposited by Bain to his own credit. He insisted it be placed in the bank in the name of the Tanana Trading Co.

"Q. Then you sent a telegram to Bain, did you not?

"A. Yes, I sent a telegram to Bain the next morning. (736-738).

* * * * *

This telegram which Struther testified to is shown on p. 1030, Eccles:

"I will stand by you on boat sale and barges. Wire Bonnard particulars of sale. Specify rate allowed us. Address all telegrams private nature Bonnard. Must have 50,000 deposited Washington Trust Company credit Tanana Trading Company. Have them wire us to that effect. This must be done to avoid trouble here. Portion of this is to apply freight charges. Give Isom check to cover when he gives you check 50,000. Wire what has been done future shipment. Will then wire what we absolutely need. Get their guaranty shipments will be delivered this season. Come home by Dawson immediately. Have Pennsylvania shipment bill prepaid. Will be unable to stay storm unless full amount 60,000 shows fifty there ten here all credit Tanana Trading Company. McLean wants $15,000 his share boat. Merchandise selling here at cost. Answer at once. Ella sold yesterday. Light turned over to-day.—Struthers."

Bishoprick and Dwyer also saw the telegram of Isom to Struthers of July 11th regarding full payment and providing that Bain should have $30,000.00 for use in buying merchandise and that $20,000.00 balance was to be held on account of future freight (743).

(c) Acquiescence During that Season, '06.

During the summer of 1906, after this contract was signed in Seattle, up to October 22, payments were made *by the Tanana Company* through its proper officer at Chena to the North American Company *for freight* transported by the latter company at the rate of $60.00 a ton as follows:

Sept. 8	$11211.58	
Sept. 8	3500.00	
Sept. 28	1900.00	
Oct. 5	3500.00	
Oct. 17	2500.00	
Oct. 23	1000.00	
Making a total of	$23611.58	(543)

This left a balance of freight money due from the Tanana Company of $16082.19 (541), which was credited on the $60,000.00 purchase price of the boats, so the North American Company has discharged this $60,000.00 by the original cash payment of $10,000.00 by draft to Chena from Seattle and by the cash advances in Seattle for merchandise, leaving only, as stated previously, $1397.80 due. (Ex. 41).

Observe the receipt at Chena of the $10,000.00 cash payment August 6th, that season, additional acquiescence.

The expense bills for the freight began arrving at the Tanana Company's store in August. (See freight and expense bills, pp. 1279-1332, also p. 742). Nay, more, *many of these bills specified the contract rate,* $60.00 per ton. The attention of the court is directed to this, and where the rate was not specified, it could easily be figured from the cost and the tonnage (753). *These bills were received at Chena and were checked over by the members there, including Bishoprick and Dwyer* (754). Thus these last two, subsequent dissenters, were parties to active acquiescence in what they afterward claim was the unauthorized act of only Bain and Struth-

ers. As the freight was removed from the steamer to the warehouse, the freight was checked by means of these very bills, and Dwyer arranged for the storage of the freight. After the freight was checked up the expense bills hung in the office at all times where the members could see them (755, Deft's Ex. 47). On September 8th there was a large shipment received from the N. A. T. Co. on which payment was required before delivery. At that time Dwyer and Bishoprick were present (757).

Bain had arrived from Seattle. He reached Chena September 12 (762). The contract which he had entered into he read to all the members in the company's store. And after this the Tanana Company continued to receive freight from the defendant under this contract. And, more, it continued to pay for it. *No protest concerning the rate was made by the Tanana or any one on its behalf.* (764). No action was taken until October 23, when Livingston protested, *not to the defendant,* but *to the bank* on which the check was drawn (765). The operating season was now finished without a protest. The Tanana Company had gotten the full benefits of the bargain.

(d) Ratification and Estoppel by Acts in '07.

In the latter part of October '06, after the close of navigation, friction arose in the company. Bain and Struthers attempted to discharge Dwyer

and Bishoprick. In our opinion this quarrel (and not the sale of the boats) is the root of the present suit. Dwyer and Bishoprick retaliated by calling a meeting of directors, so arranging matters as to cause to be issued to Livingston 325 shares of capital stock of the value of $32,500.00 for the nominal consideration of $325.00! They sought to have it appear that Livingston had purchased $32,500.00 worth although not a dollar passed (164, 293). Their purpose was to give the minority control (293). Bain and Struthers were thus removed from office, the minority members, by means of this bogus issue (and at a meeting not held under the by-laws) resolving to commence suit against the North American Company, Bain and Struthers (142), charging the three with fraudulent conspiracy in the sale.

But Bain and Struthers simultaneously started suit against the other members to restrain the $32,500.00 issue to Livingston (Ex. 49). With these two suits pending between shareholders, the company was in constant friction, so it was finally decided that its affairs be wound up. Arriving at this conclusion, *all the stockholders* met on January 1, 1907 (284). Certain resolutions were passed. All were agreed that the company should be wound up, the suit of Bain and Struthers against the other members dismissed, and Bain and Livingston left in full charge, "to have sole and exclusive charge of said business' for the purpose of winding up.

This meeting of January 1, 1907, was attended by all the stockholders and directors (289) and certain resolutions were passed.

Resolution No. 1 provided:

"It is hereby agreed that such notice (of the meeting) be dispensed with and that all parties hereto expressly waive the service of notice of such stockholders' meeting." (285).

Resolution No. 2 provided that the company "be dissolved and that said corporation from this time cease to exist, save and except for the winding up of its affairs," and further "that the affairs of the corporation from this time on shall be vested in A. E. Bain as president and treasurer and A. T. Livingston as secretary, who shall act as trustees for the benefit of the balance of the stockholders," and said "A. E. Bain and A. T. Livingston to have the sole and exclusive charge of said business and to manage and control the same in the winding up of the affairs of said corporation as they shall see fit." (286).

Resolution No. 3 provided in case of dispute between Bain and Livingstone, such dispute "is to be determined by three arbiters."

As a part of the same transaction a *fourth* resolution was passed. This was also a written agreement (Deft's. Ex. 23) releasing Bain and Struthers from all liability on account of the present suit, in which the two individuals, as we have seen, had been made co-defendants. But fearing that this

release would release also the North American Company, it was agreed that this resolution and agreement should not go on the minute books (784), one Cohen, an attorney, objecting to that (960).

Here is this document signed by every shareholder and every director of the company:

"This agreement entered into this thirty-first day of Dec. A. D., 1906, by and between the Tanana Trading Company, a corporation organized under and by virtue of the laws of the Territory of Alaska, and Frank Bishoprick, A. T. Livingston, John A. Cameron, W. A. Blair and J. J. Dwyer, parties of the first part, and A. E. Bain and J. Fred Struthers, parties of the second part:

Witnesseth:

That whereas the parties of the first part did on the ..... day of Dec. A. D., 1906, institute a certain action in the District Court for the Territory of Alaska. Third Division, against the said A. E. Bain and J. Fred Struthers and the North American Transportation and Trading Company, as defendants which said action is number 640; and whereas the parties hereto have this day amicably adjusted all differences existing between them, and the parties of the first part have agreed to release the parties of the second part from any and all causes of action and damages arising out of the matters and things set forth in the complaint in the above mentioned action numbered 640;

Now, therefore, in consideration of the above and foregoing said parties of the first part do hereby release and relieve said parties of the second part from any and all liability for the matters and things set forth in the complaint in said action numbered

640, and do hereby promise and agree to release them, the said second parties, from any cause of action for damages arising out of the same.

A. T. LIVINGSTON,
FRANK BISHOPRICK,
WM. A. BLAIR,
By Bishoprick, his proxy,
JOHN A. CAMERON,
J. J. Dwyer."

(Defendant's Exhibit No. 23; Tr. p. 1240).

As to the release of Bain and Struthers in the *first* suit, the company's suit against them and the North American Company, Shareholder Dwyer states:

"Q. The paper (Ex. 23) that you have in your hand there was a part of the settlement that your people had arrived at in regard to your business affairs down there, was it not?

"A. Well, there were two different parts. There were resolutions and this was just an agreement, a joint agreement.

"Q. They were signed down there the same time the others were signed by you?

"A. I am satisfied I signed down there.

"Q. And that paper was with you at the time that you held a stockholder's meeting and you were present at the meeting of January 1, 1907?

"A. That is, when the resolutions were adopted?

"Q. Yes.

"A. Yes. (960).

* * * * *

"Q. You thought this would affect your N. A. T. & T. Co. suit?

"A. I did not intend to let it.

"Q. It was supposed to be kept under cover at that time?

"A. How do you mean, kept under cover?

"Q. I thought you stated that Cohen told you that Cohen and I had some kind of an understanding of some kind?

"A. Yes sir.

"Q. What was that professional gentleman's agreement?

"A. I presume he had your word that this here wouldn't interfere with the N. A. T. & T. Co.'s suit.

"Q. That it wasn't to come to light and therefore not affect the N. A. T. & T. Co.'s suit in any way?

"A. Yes." (964).

As to the *counter-suit* of Bain and Struthers, Bishoprick, plaintiff's witness, testifies (288):

"Q. Now this suit that was spoken of that it was agreed should be dismissed was a suit instituted by Bain and Struthers on the 15th day of November, 1906, to set aside and cancel this issue of stock that had been made to Livingston, and to enjoin the Tanana Trading Company from issuing any stock or from allowing the said Livingston to use said stock at the stockholder's meeting that was to be held in January 1907?

"A. Yes sir.

"Q. And that suit was subsequently dismissed pursuant to this agreement?

"A. Yes sir.

"Q. And it was agreed that the sole management and control of the business should be turned over to Livingston and Bain?

"A. Yes sir, for the winding up of the business and closing out the merchandise."

And the stockholders did choose Bain and Livingston for this purpose (785). And the suit now on appeal, as far as it concerned Bain and Struthers as co-defendants with the North American Company, was dismissed as to them both. The original complaint in this action shows Bain and Struthers joined as co-defendants and conspirators. (Ex. 53, 786).

But this is not all. While Bain and Livingston were thus in 1907, the year following the sale, in sole and exclusive charge of the winding up, an order was given by their company upon our clients and the sum of $1000. was received on account of the very contract forming the basis of this suit. This occurred in August 1907 (624):

"Fairbanks, Alaska, August 22, 1907.—To the N. A. T. & T. Co., a corporation:—You are hereby instructed to pay A. T. Livingston the sum of $1000.00 at Seattle, Washington, the same to be in partial payment of the sale of the steamers made by the Tanana Trading Company to you in July 1906, and said amount to be deducted from the balance due the Tanana Trading Company on account of said sale.—Tanana Trading Company by A. E. Bain, President." (Deft's. Ex. 22, 1239).

This payment was made to the Tanana Trading Company under the following receipt:

Seattle, Washington, August 31, 1907.

"North American Transportation & Trading Co.,
Seattle, Dr.
To Tanana Trading Co.
"No. 2374.

"Partial payment on account of balance to Tanana Trading Company for sale of steamers under contract of July 10, 1906, $1000.00

"E. G. SHORROCK
W. McA.
Examined
Examined and found correct
J. B. SHALLENBERGER
Approved .....
Approved by payment.
W. S. B.

$1000.00 Dated August 31, 1907

Received of North American Transportation & Trading Co. $1000. in full settlement of above account.

TANANA TRADING CO.,
A. T. Livingston, Secretary."

(Deft's. Ex. 21, 1238).

Let us examine this contract as an executed transaction. The Tanana Company delivered to us the boats and barges as called for in the contract. We paid the Tanana in cash at the time of the transaction, $10,000.00; subsequent cash items, $2250.00; merchandise paid for, $25812.62; to Livingston to discharge lienable claims against the barge "Dakota," $3300.00; freight charges for freight earned, $16,000.00; various small items ranging from $10.00 to $500.00 for charges against the

various boats incurred prior to delivery, leaving a balance due the Tanana Company of $1397.80, which is withheld, as before stated, for the reason that the Tanana Company has never delivered title to the bark "Independence." These items are all set forth in defendant's Exhibit 41, and are explained in the testimony, page 538. No part of this sum of some $59,000.00 has ever been returned or offered to be returned to the North American Company and no demand was ever made by the Tanana Company for the return of the boats (536).

The only dissatisfaction of Bishoprick and Dwyer to the contract as actually made and carried out was that the freight rate was $30.00 instead of $60.00. In all other respects they were satisfied. (296).

This is their own testimony. It is significant that these two small minority stockholders are the only members who have shown any interest in this litigation. Bain, Struthers and Livingston have expressly ratified the contract. Cameron and Blair neither appeared as witnesses nor was their absence at the time of the trial accounted for. But there is one thing we have seen they did. They attended that final meeting of all the shareholders and directors, joined in the secret resolution to let Bain and Struthers off, signed a paper to that effect, actually let them off from liability, and restored Bain to lost control, under which as late as August '07 he got for them the final $1000.00 out of our defendant client.

OUR OPPONENT'S STATEMENT OF THE CASE.

The first four and a half pages of plaintiff's brief contain a repetition of its amended complaint. The charges of fraud and conspiracy are reiterated.

Counsel have assumed the *proof* to be the same as their own allegations in the complaint.

First. Their brief, p. 6:

"During the transaction between Bain and Isom in Seattle and prior to the consummation of the sale Bain received advise from Chena to the effect that the directors of the company positively refused to sell unless the defendant company would pay $60,000 in cash, and unless it give a $30. freight rate. Isom also knew this for the reason that Bain testified that he showed him a telegram stating that the directors at Chena positively insisted upon the $30. rate."

They cite pages 520 and 579 of the transcript, but the testimony itself does not sustain any such statement:

Isom says:

"Q. I will ask you to state whether or not prior to the time of the consummation of this sale Bain showed you a telegram that he had received from the Tanana Trading Company or from J. Fred Struthers?

"A. Not prior to the sale, no.

"Q. When did you first, if ever, see any telegram that either Struthers or the Tanana Trading Company had sent to Bain?

"A. My attention was called to two telegrams that I think were received at Seattle on the 11th of July. One of these telegrams I saw, the other I did not. Mr. Bain came to see me at the hotel on the morning of July 11th, I think, before I went to the office, and said to me: 'I have a telegram from my people and they do not seem entirely satisfied with the deal I have made.' I said, 'What is the trouble now?' 'Well,' he says, 'I have a telegram from them, it is an odd one, there is some mistake about it, it is so ridiculous.' I said, 'What is it,' and he said, 'They are asking for a $30 rate on freight,' and I said, 'If that is the case we had better call the thing off. I would not consider such a ridiculous proposition,' and he said, 'No, there is no doubt that it was a mistake of the code word.' The telegram was in code.'

"Q. Did you see that?

"A. No, he simply mentioned it.

"Q. You did not see any of the telegrams?

"A. No sir."

Again, p. 579, to which counsel refers, after quoting a long telegram dated Chena, July 11th, in which Struthers says: "I will stand by you on the sale," plaintiff's counsel asked Isom if he did not see this on the morning of the 11th:

"A. Not on the morning of the 11th, no sir.

"Q. When was it?

"A. The afternoon of the 11th."

Thus on the very references made by the learned counsel in their brief to the testimony, the statement just quoted from their brief is incorrect.

At the bottom of page 6 counsel say Isom showed this telegram to his attorney, and that his attorney advised him that he might safely proceed with the deal, and that the worst that could happen might be that they could sue Isom for the difference in freight. They cite us "Tr. 524." But when we refer to that page of the transcript we find that this discussion between Isom and his attorney occurred on the *11th* of July, *two days after the contract was made, and after $10,000 cash payment had been made to the Tanana Company.*

Second. Brief, p. 7, counsel say: "Isom admitted that he, Isom, knew at that time (August 1906) the directors of the company other than Bain and Struthers were in ignorance of the $30 rate provision in the contract (Tr. p. 593)."

When we look at "Tr. p. 593" we follow to other pages:

"Q. (to Isom) Did you disclose those facts to any other member of the Trading Company?

"A. I was not asked about it by any one.

"Q. Did you disclose it to any one?

"A. No, to the best of my knowledge I did not.

"Q. But you left out the little item of the rate per ton, didn't you?

"A. That I supposed they understood." (596).

"Q. You didn't intend to let them know they weren't getting it at that time?

"A. If they asked I would have told them." (597).

"Q. You knew that when you were getting Dwyer to sign that paper and you knew that the Tanana Trading Company supposed that the contract had been entered into for a $30 a ton flat rate?

"A. No, I didn't suppose any such thing.

"Q. You did not tell them any better?

"A. No. I supposed that Bain had sent a copy of the contract."

Third. Brief, p. 8, counsel refers to pages 741 and 843. That Struthers withheld knowledge from Bishoprick and Dwyer. What is the testimony on those very pages?:

"Q. (to Struthers) What did Bishoprick say in regard to these contracts that he was going to enter into in regard to feed as to the freight rate?

"A. He said that if our rate is $30.00 we will make $30.00 a ton on feed. He says: if it is as high as $60.00 we won't lose any money, and if it is between $30 and $60, we will make the difference between that and what it is contracted for. I knew that the rate on feed was higher than $60. from Bain's telegram." (741, 742).

And as for page 843, the actual testimony is by Struthers:

"Q. After receiving this telegram from Isom they knew everything you knew down there except the $60.00 rate?

"A. They would know everything I knew except the $60 rate.

"Q. They would also know that A. E. Bain had not made the sale there in accordance with the resolution?

"A. They knew that the night they got the other telegram.

"Q. What other telegram?

"A. The telegram directed to me and asking me to stand by him in the sale.

"Q. They told you it looked suspicious?

"A. They put it a little stronger than that."

Fourth. Brief, p. 11. Counsel say the amounts which the defendant company paid upon the purported contract of July 10, 1906, before the minority stockholders obtained knowledge of their fraudulent scheme, were $10,000.00 cash paid *to a Seattle bank* to clear a *lien* on the J. P. Light, pursuant to a draft issued by the Tanana Company and $21,916.24 paid to the defendant company at Seattle on account of merchandise purchased by Bain. Citing "Tr. pp. 539, 1228."

The facts are the $10,000 cash was *not paid* to a *Seattle bank,* but by Parkin, Isom's agent at Fairbanks, to the *Tanana Company at Fairbanks.* (520). In addition to the $21,916.24, counsel's own citation (539) shows *other large amounts* paid on account of merchandise and lienable items. All these payments are itemized and conveniently stated in defendant's Exhibit 41.

Fifth. Our opponents' next statement (their first paragraph p. 12) is not supported by any reference to the testimony. Counsel makes here the

grossly incorrect statement that on the basis of a rescission of this contract all they have to tender back to our clients is $9000.00, which they are now not even tendering in this court, but professing a willingness to credit upon their damages. Throwing out of the question the necessity or propriety of tender, and looking only to the amount, this balance or credit of $9000. is ridiculous. By turning to defendant's Ex. 41, your Honors will see what are in this case the undisputed items on both sides. It will there be seen that our clients have advanced in all more than $60,000.00, *even if the freight be charged at $30. a ton.* We paid them, in other words, $10,000. in draft paid at Chena at the outset, approximately $25,000. in funds for merchandise purposes at Seattle, discharging liens on the Dakota, $3,300.00; and now we will say the freight, 700 tons at only $30.00 a ton. This last item of $21,000.00 makes, upon their own figures, an advance by us of about $60,000.00. From them we have received only $23,000.00 freight paid at Chena (under expense bills as already shown, and we may add at a $60.00 rate). This alleged small balance of only $9000. becomes still more ridiculous when we will suppose for a moment that we hauled the freight for nothing. Dropping out entirely, then this item of $21,000.00 and hauling the freight for nothing, we present an advance of approximately $39,000.00 on our side, and have received only $23,000. from them. This would leave at least $16,000. in our favor.

We presume, however that counsel will not ask this court to consider us as hauling the freight for nothing. The balance, then, is against them at about $39,000. We deal with these figures as absolutely against our opponents, because they expect the boats to be returned and so demand. That item consequently disappears as a debit against us, for our opponents are maintaining that even on the return of the boats to them, they will owe us only $9000., which, as already stated, they do not offer to return but will credit after getting the boats back on the damages which they allege their company has suffered by reason of not having the boats during the operating season of '06 on the Yukon.

Perhaps nothing more fully illustrates the folly and unfairness of this lawsuit than an analysis of these figures. In a word, this unreasonable plaintiff, claiming damages as to being deprived of the boats, puts itself in the position of being allowed to keep them for purposes of an accounting, yet in the accounting demands these boats back, in order to reduce what would otherwise be the heavy refunds necessary to be made by them to us.

Sixth. The only direct quotation, in *haec verba,* from the testimony by our opponents, is as follows, on page 20:

"Struthers himself testified that the 'boys didn't get next' until September 12, 1912." (Tr. 850).

Examine p. 850: Not a word of this quotation

is there. What is there is actually the contrary. Struthers says:

"Q. What do you say now would cause them, that is Bishoprick and Dwyer to know that freight was coming in at a different rate?

"A. The expense bill would show it was coming in at a different rate.

"Q. They would know from that?

"A. Yes."

It may be that some part of the testimony in this case has this quotation of our opponents but we have not found it.

Seventh. Counsel then refer to lack of knowledge that they were making payments all the while on freight at $60.00 rate, citing "transcript 854." We have searched that page but it is not there.

Eighth. Citation at the top of page 23, brief, "Tr. p. 783," is evidently error. There is no testimony as therein stated.

ARGUMENT.

1. Bain was authorized to make the sale.

2. Ratification and estoppel.

3. Release of Bain and Struthers was a release of this defendant.

1. *Bain's General Authority.*

By its course of dealings from the time of its organization in January, 1905, the Tanana Com? pany held out its president Bain as authorized to conduct all its affairs. We have seen that the company held no corporate meetings, either of stockholders or directors. Large corporate transactions were executed by Bain. He was given some $40,-000.00 and with no limitation bought merchandise. General discussions of corporate affairs had taken place among the stockholder-directors, and contracts were made and executed for the corporation accordingly as each member might feel that it was advantageous for it. Bishoprick had purchased a steamer without any corporate action (189) Whenever a question of policy arose, it was simply discussed among the members in an informal manner. All stockholder-directors felt the necessity and advisability of a sale of the boats.

Bain, with large discretionary powers was in Seattle; his associates miles away in Alaska. An opportunity to sell to advantage presented itself. Bain

telegraphed to his associates that he *had sold* for $57,000. What was their response?

"Willing to sell our interests stated [that is $57,000.00], boats to be turned over immediately upon expiration of second trip, we to get special freight rate balance of season and next." (728).

It is not contended that the actual contents of this telegram was communicated to Isom. This telegram was the expression of opinion of Bain's associates that it was deemed advisable to sell at $57,000.00 with some minor suggestions as to the disposition of pending cargoes and freight rates. It was never contemplated by any of the members that these suggestions could in no way be modified by either side.

Under the general authority granted President Bain and the suggestions contained in the above telegram, was not Bain fully authorized by his company to bind it by the contract made? Both sides to this contract made some concession from these suggestions. This is quite usual in all business dealings. Isom gave $60,000.00 instead of $57,000.00, the special freight rate was granted, as it will be recalled that the prevailing and usual rate was $70.00. (463). In exchange for the increased price, Bain, for his company, agreed to a delivery of the boats at once. Opponents must concede (a) that where an officer has exercised power within the general scope of his actual authority and within the powers of the corporation to buy and sell property for such period of time as justifies others in believing that his acts

are within his powers, that his contract is binding on his company, whether he had the actual authority to enter into it tor not. *Martin v. Webb,* 110 U. S. 7; (b) that where an officer has specific authority to enter into a contract, a slight deviation from the general authority thus given will not invalidate his act on behalf of the corporation. *Jenson v. Toltec Ranch Co.,* 174 Fed. 86 CCA.

2. *Ratification and Estoppel.*

These two subjects are so closely related that we discuss them together. The following acts and circumstances show that the plaintiff is not now in a position to question the contract:

1. The suspicions of July 10.

2. Delay in acting until November 20.

3. Accepting and retention of benefits under the contract:

(a) $10,000.00 in cash.

(b) $25,000.00 merchandise money July and August '06.

(c) Receiving and paying for freight without protest at $60.00 rate August, September and October, '06.

(d) $1,000.00 cash August, '07.

(e) No demand for return of vessels and no tender of consideration received.

4. Written consent of all stockholders save 85 shares out of a total issue of 421.

5. Stockholder-directors' own admission that only objection to contract was the $30.00 rate.

6. Release of Bain and Struthers at meeting attended by all.

There is a broad distinction between acts which are*beyond the corporate powers* and acts which are *in excess of authority granted.* This contract was within the corporate powers of the plaintiff. Another distinction exists between the enforcement of an executory contract *and the rescission of a contract which has been executed.* This contract is executed; the defendant has received the boats and plaintiff the purchase price.

Inactivity. Now it was on the evening of the very day that this contract was signed in Seattle that Bishoprick and Dwyer at Chena, Alaska, became suspicious. Bishoprick himself opened the telegram of Bain to Struthers. "In the matter of the boat sale, won't you back my action?" Bishoprick says that when he opened this telegram, he sent word down to Struthers to come to the store immediately.

"He came up there to the store and I asked him what this meant. 'Well,' he says, 'you can answer that as well as I can.' He says, 'I don't know anything about it.' 'Well,' I says, 'that looks kinder suspicious to me. * * * We were very much excited at that time, thinking it looked rather suspicious."

"Q. You got the telegram and opened it yourself?

A. Yes sir." (940).

Further testifying in regard to the telegram on the evening of the 10th (944):

"Q. And you were suspicious?

"A. Yes sir.

"Q. It didn't sound just right to you?

"A. It certainly did not.

"Q. You felt as though the sale had not gone through according to the resolution.

"A. That is what that telegram led me to believe.

Q. So you asked Struthers about it and he said, 'You know as much about it as I do?'

"A. Yes sir." (944).

With their suspicions aroused, what did Bishoprick and Dwyer do? No inquiry was made of Bain, Isom, the defendant company, or any of its officers. Instead, these men without one word in opposition, saw $10,000. paid to their company; merchandise bought on its behalf; the discharge of pressing liens on its vessels; the reception of freight and payment therefor. The internal affairs of the Tanana Company from July 10th ran as smoothly as they had before that time, until Bain and Struthers, the majority stockholders and the active heads of the company, informed these gentlemen that their services as paid employees of the company were no longer

necessary. It was not until Bishoprick and Dwyer received this notice that they made any move. This was in October. Still no protest to the defendant. Then by means of the fictitious issue of stock to Livingston at a quasi meeting of directors, this suit was determined upon.

It was the duty of these men, when their suspicions were aroused on July 10th, to act, and that promptly. In *Egbert v. Sun Co.,* 126 Fed. 568, the court said:

"It was of course known that the president, under the general authority which he exercised, had made whatever agreement was made, and therefore the omission of the board to make any inquiry respecting it must be taken to have amounted to an affirmation of his powers to settle and prescribe its terms."

The minority stockholders could not stand by in order to determine whether or not this contract would prove advantageous to the company. *It was then in process of execution.* Prompt disaffirmance brought home to this defendant was necessary.

Reception and Retention of Benefits.

Your Honors have had occasion to pass on this question of ratification of corporate acts numerous times. Attention is directed to three of these decisions, all of them involving the validity of corporate contracts entered into on behalf of a corporation by the president. In all of them it was contended that the president was acting in excess of his authority.

Alaska & Chicago Commercial Co. v. Solner, 123 Fed. 855;

Washington Irrigation Co. v. Kurtz, 119 Fed. 279;

Owyhee Land & Irrigation Co. v. Tautphas, 121 Fed. 343.

The *Solner* case is particularly applicable on the facts to the case at bar. In that case the sale was of *all of the assets* of the corporation by Bauerle purporting to act as its manager. The assets consisted of real estate of the alleged value of $10,000. and a stock of merchandise of $15,000. All were sold for $5000. (The court will note that in the case at bar, the boats were sold to the defendant at a price about twice the valuation placed upon them by the plaintiff). The power of this agent to make the sale was even questioned by Solner, the purchaser, and it was recited in a written memorandum that Bauerle gave Solner, that while the conveyances were somewhat "questionable for want of sufficient authority on the part of said William J. Bauerle to execute the same for and on behalf of the corporation." the agent agreed that he would secure proper conveyances if necessary. The money was paid by Solner into the corporation. The corporation brought suit to rescind this sale made to Solner and to recover damages of $15,000. After discussing the question of tender, to which reference will presently be made in a subsequent part of this brief, Your Honors said, concerning the ratifi-

cation of the contract by the acceptance and retention of the benefits under it:

"The amended complaint, filed more than one year after the suit was brought, alleges a full knowledge of the sale upon the part of the corporation; but there is no averment therein tending to show any disaffirmance thereof by the corporation. In *Indianapolis Rolling Mill v. Railroad,* 120 U. S. 256, 259, 7 Sup. Ct. 542, 544, 30 L. Ed. 639, in discussing the direct question here involved, the court said:

'The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent required that, if they had the right to disaffirm it, they should do it promptly, and if, after a reasonable time, they did not so disaffirm it, a ratification would be presumed. In regard to this it appears that the board, when notified of what had been done by their agents, did not disaffirm their action at that time, but that the act or resolution of disaffirmance was passed about two years after notice of the transaction, and that, if the suit brought in this case can be considered as an act of disaffirmance, it came too late, as it was commenced some six months after they had knowledge of the release. As we stated in the somewhat analogous case of the *Twin-Lick Oil Co. v. Marbury,* 91 U. S. 592, 23 L. Ed. 328, "the authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party, with whom that right is optional, is aware of the facts which gave him the option, are numerous. * * * The more important are as follows, *Badger v. Badger,* 2 Wall. 87 (17 L. Ed. 836); *Harwood v. R. R. Co.,* 17 Wall. 78 (21 L. Ed. 558); *Marsh v. Whitmore,* 21 Wall. 178 (22 L. Ed. 482); *Vigers v. Pike,* 8 Cl. & Fin. 650; *Wentworth v. Lloyd,* 32 Beav. 467; *Follensbe v. Kilbreth,* 17 Ill. 522, 65 Am. Dec. 691." ' "

* * * * * * * * *

"When Bauerle executed the deeds he acknowledged that his authority to do so might be questioned, and he believed that his acts would be ratified. He was an officer of, and authorized to manage the business of, the corporation. He assumed the responsibility of making a sale of the property, and from a portion of the proceeds paid certain debts of the company. The corporation received and applied the proceeds without making any objection to the sale. It must be assumed from his acts and conduct, in the absence of any showing to the contrary, that he communicated all the facts to the corporation. With knowledge of the facts, the corporation did nothing. It neither actively affirmed nor disaffirmed the transaction. When the entire testimony in this case is examined, we are of opinion that it must be presumed by the silence and acquiescence of the corporation that it was satisfied with the acts of its secretary and treasurer, and for the failure within a reasonable time to disavow his acts it must be held to have ratified the same. It could not play both hot and cold at the same time, and wait to see what would be the result of the suit brought by Heinze. Equity and good conscience required that it should act promptly in the premises, and its assent may be implied from silence or from failure to act, or it may be inferred from circumstances. *Leggett v. Mfg. Co.,* 1 N. J. Eq. 541, 23 Am. Dec. 728, 738; *Choteau v. Allen,* 70 Mo. 290, 325; *First National Bank v. Kimberlands,* 16 W. V. 555, 581. It need not be shown by direct evidence that the acts of the agent were expressly approved by the board of directors, 'but,' as was said in the case last cited, 'such ratification may be inferred from their accepting the benefits of the act or contract; as, if under the contract so made by the president or other officer money is to be paid to the corporation, and it is received by the corporation, and applied to their use, *even without the knowledge of the directors, if it is not returned when it becomes known to the directors that it has been applied to*

their use, such conduct would be a ratification of the contract of such president or other officer."

And in the *Kurtz* case, it was said:

"The corporation could not accept the conveyance of the land upon which the consideration of the contract was based and then deny the authority of its president to enter into the contract."

That case was likewise based upon a contract made by a president of a corporation, in which it was alleged that the president exceeded his authority, but the corporation was held bound to the contract so made by reason of the fact that it had accepted and retained the consideration therefor.

In the *Owyhee* case, where the contracts had been executed by the president and had been repeatedly recognized by the corporation by payment of a large part of the consideration, it was held that after full performance by the other party, the corporation could not question the validity of the contract, that there was no merit in the case, and that judgment was affirmed with a ten per cent. penalty for frivolous appeal.

The doctrine of ratification has been thus firmly established in this circuit. Analogous allegations to those in plaintiff's complaint are found in *Metcalf v. American School Furniture Co.,* 122 Fed. 115, in which it was alleged that *the directors and another corporation had conspired* to injure the corporation of which the complainant and her associates were minority stockholders, by a transfer of the corporate assets. The court said:

"Having in mind the legal distinction between the right which the corporation possesses to rescind a contract on account of fraud and by reason of acts claimed to be *ultra vires,* how can it be insisted that the solemn contract made between the Buffalo Company and the American Company should be set aside, after it had become executed, in obedience to the behest of the complainant? Her right, as heretofore stated, is not enlarged beyond that of the corporation. Her status is accordingly narrow and circumscribed. Title to property and its possession having passed to the grantee, the corporation is estopped from seeking a rescission of its contract. A stockholder standing in the shoes of the corporation likewise is estopped from asserting the invalidity of such an act. A court of equity would undoubtedly, at the suit of a stockholder, enjoin a threatened act by the corporation beyond its granted powers. *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 557. But it is strenuously urged by complainant that the *ultra vires* acts invalidated the contract of sale. I think the weight of authority is against an interpretation of the doctrine of *ultra vires* as claimed by complainant. *Holmes v. Holmes,* 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448; *Miners' Ditch Co. v. Zellerbach,* 37 Cal. 543, 99 Am. Dec. 30. In the former case the court said:

"'But assuming the transaction to have been *ultra vires,* the defense as interposed would still be unavailable. The plaintiff has the stock, and has paid for it. It cannot be recovered back by the defendant, for the transaction is completed and closed. Whilst the contract remained executory, if it was unauthorized, a stockholder or person interested might have interfered by injunction, and prevented the transfer of the property of the plaintiff to the defendant; but, the contract having become executed, the title to the stock now vests in the plaintiff, and it has the power to sell or dispose of the same.'"

Cases from other circuits are as followys:

Jenson v. Toltec Ranch Co., 174 Fed. 86;

Augusta T. & G. R. Co., v. Kittel, 52 Fed. 53;

Kingman & Co. v. Stoddard, 85 Fed. 740;

Simon v. Goodyear Metallic Rubber Shoe Co., 105 Fed. 573.

And whether the acts relied upon constituted ratification is a question *not for a jury but for the court.*

Marquisel v. Insurance Co. of North America, 211 Fed. 903.

It is the general rule in corporate action that the will of the majority shall control. This sale was of only a portion of the corporate assets. Suit was started as the result of an unauthorized corporate meeting, and was rendered possible through the influence of the Livingston stock, already referred to. Of the 421 shares regularly issued by the Tanana Company, we have the following assenting to the sale by written ratification:

Bain	138	
Struthers	100	
Livingston	53	(Ex. 28)

In addition to these shares are Blair with 25 and Cameron with 20, who have not participated in any way in this action, thus leaving Bishoprick and Dwyer the only protesting stockholders, with a total issue of 85 shares. The inference clearly is that all other stockholders are satisfied. Dwyer testified that he and Bishoprick were the only dis-

satisfied stockholders (454). It is not the policy of the law to allow the whim of one or two small dissenters to control the will and wishes of the overwhelming majority. As was said in *Carson v. Allegheny Window Glass Co.,* 189 Fed. 791, at 804:

"The complainant stands alone as to the complaining party, yet this court, having jurisdiction of the subject-matter and of all the parties as they now stand on the record by reason of diversity of citizenship and the amount in controversy, any other stockholder, by virtue of his stock ownership, and regardless of his citizenship or the value of his stock, was entitled to intervene by leave of court. That no other stockholder has sought to intervene, justifies, in the absence of evidence to the contrary, an inference, by no means conclusive of the case it is true, that the other minority stockholders either do not view the contract of purchase as unfavorably as does the complainant, or believe that the setting aside of that contract under existing circumstances would be more detrimental to than promotive of their interests as stockholders. Further there is no evidence that of the minority stockholders other than the complainant, more than a small part of any number or amount sympathized with the purpose of the bill."

A somewhat analogous situation occurred in the Solner case already referred to, in which it appeared that one Heinze, a dissenting minority stockholder, was the instigator of the suit brought by the plaintiff corporation. Again the dissent of this small minority stock was not as to the *whole contract* but only as to the $30. freight rate. This was Bishoprick's own testimony (296). A party cannot affirm that portion of a contract which he deems advantageous and disaffirm that which dis-

pleases him. To allow such conduct would make all corporate relations uncertain, subject to attack, and a constant source of litigation.

It was said in *Bauersmith v. Extreme Gold Mining Co.,* 146 Fed. 95:

"But is certainly was known by the directors that in seeking to effect this and other sales, he was acting for the company on authority which proceeded from somewhere, and in accepting the benefit of his services they necessarily committed themselves to the means by which these services were secured. This is not to impute or presume knowledge, is not that they might or ought to have known and are therefore to be held as though they did. But, having taken advantage of what had been done in their behalf, they could not afterwards refuse to be bound thereby, a doctrine which is abundantly sustained by the authorities (citing authorities). As said by Sharswood, J., in *Mundorff v. Wickersham,* 63 Pa. 87: 'Thus where a party adopts a contract which was entered into without authority, he must adopt it altogether. He cannot ratify the part which is beneficial to himself and reject the remainder. He must take the benefit to be derived from the transaction *cum onere.*' * * * While, then, in the case in hand Dr. Chambers may have had no authority to bind the company by written agreement with the plaintiff, as he undertook to do, yet when the board of directors accepted the benefit of plaintiff's services which were so secured, as they did when they adopted the sale which he had negotiated with Whittaker, they took upon themselves the obligation to compensate him according to the terms of the agreement under which he acted, whether they knew of its existence or not. * * * It was therefore the duty of the directors to inquire and know upon what terms he was acting and to give timely notice if they did not propose to be

bound thereby. They could not play fast and loose with the plaintiff, appropriating his services and refusing the compensation stipulated for, for which those services were obtained."

Acts of Ratification Continuous. The defendant does not rely on one act of the Tanana Company as constituting a ratification. It is interesting to observe that the acts of recognition are numerous, constant and extended over a long period of time. After the minority stockholders' suspicions of July 10th, the cash payment was made and freight was received and paid for by them at the $60.00 rate. Then we come to September 12th, when defendant Bain *read the contract to all the members.* (343). *After that time* the Tanana Company continued to pay *without protest* freight money to this defendant at the $60.00 rate as follows:

September 25	$3500.00
September 28	1900.00
October 5	3500.00
October 17	2500.00
October 23	1000.00

(See freight bills, Exs. D, E, F, G, H, I & J). These payments are itemized in plaintiff's Exhibit 42. *All of these payments were voluntarily made without protest.*

Now pass to the Tanana meeting of January 1, 1907, at which all the stockholder-directors were present, and the proceedings of which meeting were approved by them all. Passing for the time being the effect of the releases of Bain and Struthers from this action as working a dismissal as against

the defendants, which is discussed under a separate head in this brief, your Honors will recall that at that meeting it was unanimously resolved to wind up the affairs of the Tanana Company and to place the "sole and exclusive charge" of its affairs for the purpose of liquidation in Bain and Livingston. If Bain had been a conspirator, if he had defrauded this corporation out of assets worth several hundred thousand dollars, and had wrecked the corporation, as alleged in the complaint, why should the stockholders, including these two minority men, Bishoprick and Dwyer, ratify his action and give him unlimited authority in closing the corporate affairs. If they held him in such ill repute, was it legitimate, to thus hold him out, together with Livingston, as authorized to settle any corporate matter? It has been decided that where the affairs of a corporation are placed in the hands of certain officers for the purpose of dissolution, that the authority of those in charge is practically unlimited. They may even exchange *all the assets* of the corporation *for stock in another corporation.* The selling corporation is bound by their action.

Metcalf v. American School Furniture Co., 122 Fed. 115.

McCutcheon v. Merz Capsule Co., 71 Fed. 787.

With this delegated authority in Bain and Livingston, we think it could not be contended that they could not compromise or dismiss this suit. They could likewise ratify or acquiesce in the con-

tract of July 10th, and this ratification would be binding on their corporation.

In August 1907 a payment of $1000.00 was made to the Tanana Company *through these properly authorized officers.* It was contended at the trial that the acceptance of this payment was unauthorized; that these two minority stockholders did not know of the thing; that the officers had acted fraudulently in accepting payment. All of these contentions are immaterial. Whatever cause of complaint these minority men may have against *their own officers* does not concern the defendant. A payment made to a corporation through the officers entitled to receive it, is payment to the corporation. It cannot be urged by the receiving corporation that its officer misappropriated the fund.

In *Love v. Export Storage Co.,* 143 Fed. 1 it was held that where a corporation received the proceeds of notes which were placed to its credit with the plaintiff bank by means of certain transactions conducted by its president, by which he warehoused the corporation's property, and pledged the warehouse receipts to secure the discounts, and thereafter such proceeds were checked from the bank in its name by the president and treasurer, as he was authorized to do, the corporation was estopped to deny that the president had no authority to conduct such transaction. In the *Love* case, at the time the corporate action occurred, one Corkran was both president and treasurer. It was contended

that he had no power to make warehouse arrangements with the storage company and to pledge the warehouse receipts without authority from the board of directors. The court held that the question of authority was not open because the company had received the fruits of the transaction:

"The fact that thereafter Corkran may have diverted the proceeds from the company to his own private use in no way affected the prior fact that the company received those proceeds from the appellee bank."

And the act relied upon as a ratification of the prior contract may be performed, and will be binding upon the company, even *after suit started questioning the validity of the contract. Macon D. & S. R. Co. v. Shailer,* 141 Fed. 585, in which it was said:

"Now in this case it appears by the record that *since the bill was filed* and before hearing in the circuit court, at an annual meeting held of February 20, 1905, after full report and discussion, the stockholders of the Improvement Company, by a large majority in number and stock, voted down the motion to disapprove the sale complained of and instead voted to ratify and approve the same;"

and the court in that case quoted with approval the language of Mellish. L. J., in the case of *McDougal v. Gardiner,* 1 L. R. Ch. Div. 13, as follows:

"In my opinion if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate

end of which is only that a meeting has to be called and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to, and that if it is a thing which the majority are the masters of the majority in substance shall be entitled to have their will followed. If it is a matter of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly, and that, as I understand, is what has been decided by the cases of *Mozly v. Alston* and *Foss v. Harbottle.*"

Tender. The complaint makes no offer to put the parties in statu quo or to return the consideration received by the Tanana Company. The action is one at law in replevin for the return of the boats and damages for the detention. No tender of the amount so received by the Tanana Company was ever made our client; there has been no demand for the surrender of the boats. (536). Plaintiff in its brief offers to credit the consideration received by it, on *any damages* it may recover from the defendant.

Opponents cite various authorities which have no application to the case at bar. These authorities hold that where a *release* has been obtained through fraud, a tender is not a condition precedent to maintaining a suit upon the original cause of action. It must be remembered that we are dealing in the instant case with the transfer of corporate assets by officers who it is claimed exceeded their authority. The corporation itself received the consideration, which remained in the corporate treasury.

There is no evidence that any of the funds paid by the North American Company to the Tanana Company were misappropriated. The plaintiff concedes that some restoration is necessary, but says: "If we are successful in this lawsuit in two things, (a) the return of the boats, and (b) the recovery of damages, we are willing to allow an offset on the damages thus recovered."

Suppose the damages found by a jury were far less than the amount of the consideration received, no offset would be possible. The plaintiff intends to give up nothing unless it is successful in its demands.

Is this offer of restoration of the benefits received sufficient? In *Alaska & Chicago Commercial Co. v. Solner,* 123 Fed. 855, Your Honors held it was not:

"Appellant contends that in a suit of this character a tender before suit is not necessary; that an offer in the bill to make the tender is all that is required. The authorities are not uniform upon this point, but conceding, for the purposes of this opinion, that appellant's contention, as a general proposition, is correct, yet it is apparent that the offer as made in the bill is wholly insufficient. The original bill of complaint filed September 15, 1901, did not contain any averment offering to return the purchase price of the property. The first amended bill, filed September 2, 1902, did not make a sufficient offer. In the second amended bill, filed at the close of the testimony, the complainant alleged:

" 'That prior to the commencement of this action and subsequent to the alleged purchase above

mentioned the plaintiff offered to repay and tendered to the defendant the said sum of $5,000 in legal tender money of the United States, which offer of repayment and tender the said defendant then and there refused to accept, and at all times subsequent thereto has so refused, and now refuses, to accept, and that the plaintiff at all times since said tender and since said alleged sale has been ready and willing, and has offered, and hereby offers and tenders, to defendant a credit of the amount paid by said defendant for said property, to-wit, the sum of $5,000, with legal interest thereon, may be allowed as a credit in any judgment rendered herein.'

"This offer was not a sufficient tender. It was not absolute. Moreover, it was not bona fide. It was neither authorized nor sanctioned by the corporation, and must be treated solely as the act of Heinze, made without authority. In any event, it was only a conditional tender, depending entirely upon a judgment being rendered in favor of the corporation for damages. The tender must be without qualifications or conditions.

"In *Kelley v. Owens,* 120 Cal. 502, 507, 47 Pac. 369, 370, 52 Pac. 797, the court said:

" 'It is undoubtedly the general rule that there can be no recission of an executed contract upon the ground of fraudulent misrepresentation without restoration, before suit by the party seeking to rescind, of everything of value which he had received from the other party under the contract, or a bona fide offer to restore.' "

See also *Jenson v. Toltec Ranch Co.,* 174 Fed. 86 C. C. A., 8th Cir.

This branch of the law is so well settled and the *Solner* case on the facts involved so analogous

to the case at bar that further citation would only prove burdensome to the Court.

Effect of Their Releasing Bain and Struthers.

The theory of the complaint is that the defendant obtained the boats through a fraudulent scheme between Bain, Struthers and Isom. Our opponents argue that the evidence sustains this theory. They must then be content with the application of rules in harmony with their theory of the facts. Now, they argue that the release of Bain and Struthers in the present suit did not operate to release us also, because Bain and Struthers were not necessary parties to this action. This last we concede. A party suing in tort may indeed choose one, a few, or all of the wrongdoers, but it does not follow that because he may sue one or all that he may *release* anyone. This is a totally different question. He has the privilege not to sue those whom for any reason he finds it difficult or not worth while to pursue, but the law gives him no option to discharge one from his claim and yet hold the others. The reason for this is that when he releases or discharges any of the wrongdoers (and this without regard to whether they have already been joined in the suit or not) he acknowledges satisfaction of his injuries, and the law which permits him to sue whom he will among the wrongdoers does not give him the option to collect more than once. It is as if he recovered a judgment against one and not against others,

and collected his judgment. He could not, even if the liability be regarded as entirely several and not as joint and several, collect again through any of the others.

The court will notice that the instrument in regard to Bain and Struthers is not merely that the suit will be dismissed against them, but that the claims against them are discharged.

The authorities are plain that the discharge of one tort feasor is a discharge of the others, and they are equally plain that persons effecting a fraudulent scheme are tort feasors.

In the case of *Parsons v. Hughes,* 9 Paige Ch. 591 (N. Y.), a partnership was defrauded by the defendant with the co-operation of one of the co-partners. The co-partner was released from liability by plaintiff who nevertheless sought to recover from the other defendants. Held that release of the co-partner caused plaintiff to lose his remedy against defendant.

In *Farmers' Savings Bank v. Aldrich,* 133 N. W. 383 (Iowa), the plaintiff bank for a consideration released from liability certain brokers who had participated with the defendants in a misappropriation of funds by plaintiff's cashier. The defendants and the brokers had received the funds with knowledge of their misappropriation, and had used them in speculation. It was held that the release of the brokers discharged defendants.

Reynolds v. New York Trust Co., 188 Fed. 611, 1st C. C. A. The partnership of Gay & Co. converted bonds belonging to the complainant. *Held,* the filing and allowance of a claim against the bankrupt partnership estate barred a claim against the bankrupt estate of Gay, the president of the partnership, since the diversion of complainant's property by Gay and the partnership was a joint tort, or joint and several at complainant's option, and the allowance of a claim against one barred a claim against the other; and this result was not affected by the fact that here the complainant had waived the tort and elected to hold the partnership and Gay as on an applied assumpsit for the value of the goods.

See also:

Clabaugh v. Southern Wholesale Grocers' Ass'n., 181 Fed. 706, Circuit Court (Ala.)

Moorehouse v. Yeager, 71 N. Y. 594.

Mooney v. City of Chicago, 88 N. E. 194, (Ill.). This citation is not a case of fraud, but is illustrative of a great number of cases of injury caused by the concurrent wrongdoing of two or more persons.

The cases cited by our opponents are in no way at variance with the above conclusions.

The case of *Gilbert v. Finch,* 66 N. E. 133, (N. Y.), upon which they principally rely, was a case where directors of the Commercial Insurance Company had paid $35,000 of the company's funds to

the incorporators of the Maine Insurance Company in consideration of the transfer of all the incorporators' right in the Maine company. Each company became insolvent and the receiver of the Commercial Company sued the incorporators of the Maine Company for the money received. They settled this suit by paying $25,000 and obtained a release, the receiver expressly retaining his rights against the directors of the Commercial Company. The Appellate Division, whose opinion is reported in 76 N. Y. Sup. 143, held that the defendants and the incorporators of the Maine Company were not joint tort feasors, and reached this conclusion on the ground that the incorporators of the Maine Company committed no wrong in resigning their offices in favor of the defendants. However, since the money which they received belonged to the Commercial Company and they gave no consideration, the Commercial Company was entitled to recover it back in an action for money had and received. (p. 147). The lower court emphasizes the good faith of the parties. The *court of appeals,* however, seems to have taken a different view of the question as to whether the defendants and the Maine incorporators were joint tort feasors, *as it expressly assumes* (p. 135) *that they were such.* The court then discusses the much controverted question as to whether a release of the Maine incorporators with an express retention of rights against the defendants operated to release the defendants, arriving at the conclusion clearly opposed to the

weight of authority, that the defendants were not released. It would seem that if the court had not intended to overrule the Appellate Division on the question of joint tort feasors, it ought not and presumably would not have laid down a precedent upon this disputed question, when it was unnecessary for it to enter upon a discussion of it. The inference therefore from this case on the question of joint tort feasors is distinctly unfavorable to the plaintiff in error.

It is to be noted that the release in the case at bar contained no express reservation of rights against our client.

Counsel for plaintiff in error seek to supply this by parol. Their argument and references to the record on this question tend to prove nothing more than the possibility that some of the signers of the release misunderstood its legal effect. There is no attempt made to show, even by oral testimony, that any express reservation of rights against the N. A. T. & T. Co. was attempted. We submit that even if they had any evidence tending to show such reservation, it would not be competent as against the defendant, since whatever may be the rights of third persons as to varying this instrument, a party to it is bound by its terms. But, however this may be, the weight of authority is decidedly to the effect that reservation of rights against the other tort feasor is entirely immaterial. The release of one is his discharge and the discharge of one is a satisfaction of the damages, so the

attempt to keep alive rights against the others is useless.

Flynn v. Mason, 126 Pac. 181, Cal. Ap.

Abb v. Northern Pacific Ry., 28 Wash. 428; 58 L. R. A. 293; 68 Pac. 954.

Farmers' Savings Bank v. Aldrich, 133 N. W. 383, (Iowa).

Louisville & N. R. Co. v. Allen, 65 Southern 8, (Fla.).

And in the case at bar there is a further element that estops the plaintiff in error regardless of the view which the court may take upon the question last discussed. It is well settled that where one has asserted a claim against an alleged tort feasor and has obtained a settlement or has accepted a consideration in consideration of the release of that person from liability, he is subsequently estopped to allege, in order to escape the consequences of releasing a joint tort feasor, that he had no cause of action against the person released.

In *Casey v. Auburn Telephone Co.,* 139 N. Y. Sup. 579, (Appellate Division), plaintiff's intestate was killed by a fall on a defective sidewalk in the City of Auburn. She sued the city and settled for $100. Her administrator now sues the Telephone Company for the same cause. The court held that an instruction that the release of the city was not a discharge of defendant, if the city was not in fact liable, was erroneous, quoting from

Hubbard v. St. Louis & N. R. R. Co., 72 S. W. 1073, 1074, (Mo.).

"It does not lie in the mouth of such a plaintiff to say he had no cause of action against the one who paid him for his injuries, for the law presumes that the one who paid committed the trespass and occasioned the whole injury."

The New York court further quotes from the case of *Brown v. The City of Cambridge,* 85 Mass. 474, 476.

"The plaintiff is estopped to say that he had no claim against the water works for the tort, but compelled them to buy their peace by the settlement of a claim that was groundless and therefore malicious, for this would be an allegation of his own wrongful act."

The Supreme Court of California has well expressed this principle in the case of *Tompkins v. Clay Street Hill R. R. Co.,* 4 Pac. 1165, 1168.

"But one who having commenced an action against another has received money in consideration that the action shall be dismissed, or that any judgment he may recover shall not be enforced, ought not to be permitted to deny that he received the money in satisfaction of a valid demand."

To the same effect are:

Leddy v. Barney, 2 N. E. 107, (Mass.).

Leither v. Philadelphia Traction Co., 4. L. R. A. 54 (Pa.).

Miller v. Beck, 79 N. W. 344, (Iowa).

The facts of this case bring it squarely within the principle of the foregoing cases. The claim of plaintiff in error was released against Bain and

Struthers. They gave valuable consideration for this in dismissing their suit against the directors of the company who are the moving spirits in this suit. Those directors or the corporaton which is their *alter ego* ought not now to be permitted to say that they had no cause of action against Bain and Struthers, though they accepted from Bain and Struthers the surrender of rights presumably valuable as a consideration for their release.

Even if the Court finds that there was no fraud, the release in question is fatal to the claim of plaintiff in error.

The case, when purged of fraud, becomes the ordinary case of an agent exceeding his authority. Upon familiar doctrines of agency Bain then became liable to defendant in error as a warrantor of the authority to sell which he assumed to exercise.

Groeltz v. Armstrong, 99 N. W. 128 (Iowa).

Nelligan v. Campbell, 20 N. Y. Sup. 234 (Supreme Court).

Danser v. Dorr, 78 S. E. 367, (W. Va.).

M'Donald v. Luckenbach, 170 Fed. 434, 440, C. C. A. 3rd Cir.

Plaintiff in error then having released the person to whom defendant in error was entitled to look for reimbursement in case it obtained no rights against plaintiff on account of Bain's exceeding his authority can not now hold the defendant whose obligation, if any, was only secondary.

14 American & English Encyclopedia of Law, page 1162.

Irons v. Manufacturers Natl. Bank, 36 Fed. 843, (Cir. Ct. of Illinois), affirmed *sub nom. Schrader v. Manufacturers Natl. Bank,* 133 U. S. 67, 10 Supreme Court 238; 33 L. Ed. 463.

The Corporation is Bound by the Release.

The circumstances under which this release was executed lead irresistibly to the conclusion that its execution was really corporate action, but that it was withheld from the corporate records through an apprehension of what has actually occurred, namely, that it would embarrass the company's suit against the defendant in error. But even if the corporation did not act in executing this release, there is no one who can raise that objection. The release was signed by all of the directors and stockholders of the corporation at that time, except Bain and Struthers. The corporation itself has no interests to protect apart from those of its stockholders, and if they have all acquiesced in acts which have impaired rights of the corporation, there is no one who is in a position to complain. This is not a case of transferring title or of some other act requiring official and technical execution. It is a case of whether unanimous acquiescence of shareholders and directors works an estoppel. The case of *Gilbert v. Finch,* 76 N. Y. Sup. 143, which plaintiff in error relies on in this connection has no application. That case simply held that directors of the corporation could not pay out its

money receiving nothing in return, and then proceed to ratify their own wrongful acts, and to release themselves from liability. In the case at bar the persons guilty of the wrong, if any, had nothing to do with the release. That proceeded from persons holding the entire remaining interest in the corporation. These persons cannot now be heard to say that the corporation did not release the alleged wrongdoers.

Respectfully submitted,

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